Office-Supreme Court, U.S.
FILED
SEP 19 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 17

JESSE M. CALHOON, *et al.*,

Petitioners,

—v.—

RAYMOND H. HARVEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

THOMAS G. S. CHRISTENSEN
40 Washington Square South
New York 3, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York 10, N. Y.

Attorneys for Amicus Curiae

INDEX

PAGE

Interest of *Amicus* 1

Question Presented 2

Statement 2

Summary of Argument 4

ARGUMENT:

The District Court was not deprived of jurisdiction under Section 102 to remedy an alleged breach of the right of union members to nominate candidates merely because the conduct constituting such an alleged breach might also be subject to post election challenge under Title IV 7

A. The Union election abuses which the Act was designed to eliminate require pre-election judicial relief 7

B. Title I of the Act was specifically designed to provide such pre-election relief 9

C. The intent of Title I would be frustrated under the District Court's jurisdictional view 13

CONCLUSION 21

Cases Cited

PAGE

Beckman v. *Local 46, Intl. Assn. of Bridge Workers*, 314 F. 2d 848 (7th Cir. 1963) 14

Johnson v. *San Diego Waiters & Bartenders Union*, 190 F. Supp. 444 (SD Calif. SD 1961) 14

Mamula v. *United Steelworkers*, 304 F. 2d 108 (3rd Cir. 1962), *cert. denied*, 371 U. S. 823 14

Robins v. *Rarback*, 325 F. 2d 929 (2d Cir. 1963) 14

Warner v. *Goltra*, 293 U. S. 155 (1934) 15

Statutes Cited

Labor-Management Reporting and Disclosure Act:

Title I, 29 U. S. C. §§ 411-415 ..... 1, 2, 4, 5, 6, 9, 11, 12, 13, 14, 15, 18, 19, 20

Section 101, 29 U. S. C. § 411

Section 101(a), 29 U. S. C. § 411(a) 6

Section 101(a)(1), 29 U. S. C. § 411 (a)(1) 3, 14, 18

Section 101(b), 29 U. S. C. § 411(b) 19

Section 102, 29 U. S. C. § 412 ..... 2, 4, 6, 7, 12, 14, 15

Title IV, 29 U. S. C. §§ 481-483 ..... 1, 2, 3, 4, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20

Section 401, 29 U. S. C. § 481 17

Section 401(c), 29 U. S. C. § 481(c) 16, 17

Section 401(e), 29 U. S. C. § 481(e) 3, 13

Section 403, 29 U. S. C. § 483 ..... 15, 20

MISCELLANEOUS

PAGE

Aaron, The Union Member's Bill of Rights: First Two Years, Industrial Relations, Vol. 1, No. 2 (1962) 20

ABA, Report of the Committee on Development of the Law of Union Administration and Procedure, Section of Labor Relations Law (1960) 20

Hearings Before Select Committee on Improper Activities in the Labor or Management Field, 85th Congress, 1st Session (1957) 8

NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 ..... 7, 11

S. 1555, 86th Congress, 1st Session (1959) 10

Senate Report 187, 86th Congress, 1st Session (1959) 7, 10, 13

Summers, Judicial Regulations of Union Elections, 70 Yale L. J. 1221 (1961) 9

Summers, Pre-emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L. J. 119 ..... 16, 17

Summers, The Role of Legislation in Internal Union Affairs, Proceedings of the Eleventh Annual Meeting of Industrial Relations Research Assoc. (1959) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 17

JESSE M. CALHOON, *et al.*,

Petitioners,

—v.—

RAYMOND H. HARVEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union is a private, non-partisan organization engaging solely in the defense of civil liberties. It appears here *amicus curiae* by the consent of the parties.

Our concern in this case is that restrictions upon the conduct of union elections should not be insulated from effective challenge under Title I of the Labor-Management Reporting and Disclosure Act of 1959 by reason of the availability of partial, post-election remedies under Title IV. We take no position on the restraints themselves which the Court of Appeals held to have infringed Title I guarantees, when taken collectively. But we believe that the opportunity for pre-election challenge through private suit is essential if the rights granted by Title I are to have reality to the individual union member.

Question Presented

Whether a Federal District Court may assert jurisdiction in an action under Title I of the Labor-Management Reporting and Disclosure Act of 1959 where the conduct at issue may also be subject to regulation, in part, by the Secretary of Labor under Title IV of such Act?

Statement

Petitioners, respectively, are the President and the Secretary-Treasurer of District No. 1, National Marine Engineers' Beneficial Association, AFL-CIO, a labor organization representing licensed marine engineers. Respondents are three members of District No. 1 who brought an action against Petitioners in the District Court for the Southern District of New York under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (the Act).[1]

On January 1, 1961, the National Marine Engineers' Beneficial Association (NMEBA) adopted a reorganization plan which created subordinate "District" organizations (one of which was District No. 1) comprised of regional groupings superseding and replacing its local unions at various ports (R. 32-33, 56). In the course of the reorganization and thereafter, the union's rules as to nomination of candidates and eligibility for union office were drastically revised.[2] Subsequently, each of the Respondents at-

[1] 29 U. S. C. § 412.

[2] These changes may be summarized as follows: (1) Under Article X of the District No. 1 bylaws, a member can only nominate himself for office (R. 25-26, 37) (at p. 18). (2) Under Article X, Section 9 of the amended NMEBA Constitution, only those non-officer members having had 180 days of employment on vessels covered by NMEBA contracts in each of two of the three years preceding nomination are eligible for nomination to District office; only

tempted to make nominations of candidates for union office in an election scheduled for a period commencing September 1, 1963. Each such nomination was unsuccessful because of the application of one or more of the new restrictions. Respondents thereafter filed an action against Petitioners alleging that their rights and privileges to nominate candidates under Section 101(a)(1) of the Act,[3] had been infringed and requesting, *inter alia*, an injunction to restrain the holding of the election and to direct the Petitioners to afford the members of District No. 1 a fair opportunity to nominate candidates (R. 9-10). The District Court granted Petitioners' cross-motion to dismiss finding that, except for the self-nomination requirement, the complaint protested qualifications upon eligibility for candidacy governed by Section 401(e) in Title IV of the Act[4] litigable only by post-election complaint with the Secretary of Labor (R. 114). The District Court further found that the self-nomination requirement, by itself, was a "reasonable" restriction upon the rights of members under the provisions of Section 101(a)(1) (R. 114).

The Second Circuit Court of Appeals reversed (R. 118-125). While not ruling upon the legitimacy of the self-nomination provision or the eligibility restrictions standing alone as possible violations of the "equal rights and privileges . . . to nominate candidates" protected by Section 101(a)(1), the court held that the combined effect of the self-nomination and eligibility rules was such an invalid infringement (R. 123-124).

---

members who have previously served as a full-time, paid union officer are eligible for nomination to the office of District President; and only those who have been members of NMEBA for five consecutive years preceding nomination are eligible for any District office (R. 70).

[3] 29 U. S. C. § 411(a)(1).

[4] 29 U. S. C. § 481(e).

Summary of Argument

It is the position of the American Civil Liberties Union (ACLU) that the provisions and purposes of the "Bill of Rights" for union members contained in Title I of the Act would be, in good measure, frustrated if the procedure for post-election complaints contained in Title IV is superimposed as a bar to Title I relief. While the ACLU takes no position as to the reasonableness or unreasonableness, individually or collectively, of the restraints upon nomination to office imposed upon Respondents, it is of grave importance that the institution of inequitable restrictions not be insulated from effective challenge under Section 102. Such insulation would inevitably occur, and the intent of Title I plainly fail of achievement, if the mere availability of partial, post-election remedies through administrative action under Title IV is held to divest a district court of jurisdiction in a Title I action.

The Act was the acknowledged product of more than a decade of a steadily increasing demand that the protections necessarily accorded unions as the collective bargaining representatives of employees must be matched to some degree by federal regulation assuring that a union is the instrument, not the master, of its members. The place of union elections, in this regard, is paramount; it is membership control of the selection and rejection of union officers above all else which can insure the status of the union as a democratic institution. The experience of our state courts, before 1959 the only forum in which such rights could be tested, is testimony to that fact as well as to the logic that controls on union elections must, for effectiveness, be enforceable in the period preceding the balloting.

The Act was not only in response to a consensus that union democracy was necessary; its total scheme and the

history of the legislation in the making are voluble not mute reaffirmations of the Congressional conclusion that effective protections for union "democracy" are best assured by affording the individual member the opportunity to test any alleged bar to the full and free expression of membership desires. This premise is implicit in the progress and amendment of the controls originally proposed. It is unmistakable in the design of the finished product. The Act's progress through the Congress was initiated by a bill affording federal controls only in the post-election period and subject to the overriding authority of the Secretary of Labor in the pursuit of judicial relief against alleged wrongs. Its successful amendment was premised upon the inadequacy of such regulation and the need for individual rights enforceable at the individual's demand.

Murky as some aspects of the legislative history of the Act may be, in the instance of the interrelationship between Titles I and IV there can be little question of the intent of the Congress. Far from elevating Title IV administrative procedures under the control of the Secretary of Labor to a pre-emptive position in the protection of basic rights, the Congress directly and conspicuously emphasized the prime nature of the broad rights afforded by Title I. If, indeed, there is "overlap" in the safeguards accorded some membership rights resulting from mention in both Titles, it is plain that this was not to be at the expense of the broader protection clearly provided by Title I. A contrary conclusion would not only do violence to the evident scheme of the statute but would immeasurably dilute the strength of the provisions of Title I.

The Congress was undeniably aware of the difficulties which would beset union administration if no election could be regarded as immune from a succession of private suits seeking to overturn its results; post-election proceedings

challenging the validity of the election and its results are plainly less available as harassment techniques if subject to the control of the Secretary of Labor. Conversely, pre-election challenges through private suit under Section 102 are essential if the rights granted in Section 101(a) are to have reality to the individual union member. While an election may be subsequently invalidated after time consuming proceedings under Title IV, post-election relief is frequently of limited value to the complainant. Such relief is available only after exhaustion of intra-union remedies and then at the decision of the Secretary of Labor rather than the individual who is aggrieved. The interim period, for the protesting member, must be spent with a hostile administration in full control of union offices and authority with full opportunity to consolidate its strength and position. Most importantly, the provisions under which the Secretary is authorized to seek judicial relief carefully limit the scope of inquiry of the court in any post-election challenge.

The Act plainly affords both pre-election and post-election relief. For it to do so effectively, the availability of the former must not be sacrificed to an undesigned and unsatisfactory primacy of the latter. If Title I rights are so narrowed, most election abuses will, in practical terms, be immunized from effective criticism and control.

ARGUMENT

The District Court was not deprived of jurisdiction under Section 102 to remedy an alleged breach of the right of union members to nominate candidates merely because the conduct constituting such an alleged breach might also be subject to post-election challenge under Title IV.

A. *The Union Election Abuses Which the Act Was Designed to Eliminate Require Pre-Election Judicial Relief.*

One of the basic findings of the McClellan Committee was the need for federal legislation "to ensure union democracy" and the Act was an acknowledged response to that finding.[5] The critical, inescapable place of union elections in the attainment of that end is patent as the Senate sponsors of the proposed legislation were aware. "It needs no argument to demonstrate the importance of free and democratic union elections."[6] Accordingly, twelve of the forty-five stated purposes of the proposed legislation were directly concerned with safeguarding election procedures and a substantial portion of the statute as enacted were directed to this end.

The existence of abuses in the election processes of some unions and the difficulties of regulation in the area were well known to the Congress. The McClellan Committee "found time and again the denial of the right to vote, the denial of the right to work, the denial of the right to have a voice, the denial of the basic human rights on which our very freedom was founded."[7] The Committee at numerous points re-

---

[5] S. Rep. 187, 86th Cong. 1st Sess. p. 2.

[6] *Id.* at 20.

[7] NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1103. This source is hereinafter referred to as Leg. Hist. of LMRDA.

ceived testimony regarding the means and devices used to secure illegitimate control of union offices through manipulation of voting and nominating rules and procedures.[8] The possibilities of abuse of membership rights in this manner are plain. As an acknowledged authority in this area has commented:

> "Basic rights in the nominating process often depend upon isolated and seemingly remote details. Rejecting a nomination for lack of a second, after hasty closing of the nominations, may be but an excuse to eliminate unwanted opposition. Rival candidates may be declared disqualified for delinquency in dues even though their dues book shows them fully paid up, or employers may be induced to manipulate check-offs so as to disqualify potential opponents to the administration. The impact of detailed rules may be even more subtle. Requiring candidates to declare their candidacy four months prior to the nomination meeting may deter opposition where the union holds effective control over job opportunities, for it compels potential insurgents to expose themselves to the hazards of punitive action. Requiring candidates for top office to have served previously on the executive board seriously handicaps an opposition group in replacing the incumbents unless it can inspire a 'palace revolt.' These disputes do not concern mere technicalities but involve the right of the individual to run for office and, more importantly, the

[8] Illustrations of these practices can be readily found in the reports of the the hearings. See *Hearings Before Select Committee on Improper Activities in the Labor or Management Field*, 85th Cong. 1st Sess. at pp. 1946, 1744, 1835, 5406 (manipulation of dues payments to control voting), 4537-4556, 5581, 14881-14883, 14967, 14409, 13788-91, 13674 (eligibility procedures manipulated to disqualify all but favorite group for office), 5366, 5368, 10406-7, 11594-6 (nomination procedures misused).

right of members to select leaders of their own choosing."[9]

An exhaustive survey of the experience of the state courts in correcting these and related abuses has shown that the great majority of state suits to restrain improper conduct are brought before the voting occurs, a process that protects both the member from irreparable injury and the union from the costs and pressures implicit in the prospect of renewed campaigns and multiple elections.[10] By the time federal legislation became a reality it had been established that:

> "The primary legal protection now given by state courts against improper elections comes before and not after the election. If the nominating procedures are abused, campaigning improperly conducted, candidates wrongfully disqualified, or members classified as ineligible to vote, legal action can be brought and corrections compelled before the election is held. This is the point at which legal protection is most commonly sought and is most effective."[11]

B. *Title I of the Act Was Specifically Designed to Provide Such Pre-Election Relief.*

The initial approach of the 1959 legislation to the protection of election procedures against abuse was a significantly limited one. As reported to the Senate, the Kennedy-Ervin bill established certain regulations as to the frequency and conduct of union elections. Enforcement of these regula-

---

[9] Summers, Judicial Regulation of Union Elections, 70 Yale L. J. 1221, 1225 (1961) (citations omitted).

[10] *Id.* at 1244.

[11] Summers, The Role of Legislation in Internal Union Affairs, Proceedings of Eleventh Annual Meeting of Industrial Relations Research Assoc., pp. 260, 269 (1959).

tions was to be accomplished through complaint to the Secretary of Labor, after exhaustion of intra-union remedies, with the Secretary having sole authority to bring a civil action to set aside an invalid election. The bill went on to add, significantly, that "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections *prior to the conduct thereof* shall not be affected by the provisions of this title" (emphasis supplied) but that "The remedy provided by this title for challenging an election already conducted shall be exclusive." [12]

As presented to the Senate, accordingly, the proposed legislation did create federal rights as to election procedures. These rights, however, were significantly limited in scope and design. First, the rights created were judicially enforceable by the Secretary of Labor and not the member. Second, the remedy was specifically post-election in character. Third, the only provision for pre-election remedial action was through state suit to enforce the provisions of the union's constitution and bylaws.[13] It was precisely this

---

[12] S. 1555, 86th Cong. 1st Sess. (1959) § 303.

[13] The majority report accompanying S. 1555 made it plain that administrative control over the enforcement of the rights granted, coupled with the exclusiveness of the federal remedy once an election had been held, was deliberately chosen to afford a uniform policy for regulation and a safeguard against too frequent elections. S. Rept. 187 at 417-18. Senator Kennedy, as one of the bill's sponsors, stressed the pre-emption of the federal control in post-election proceedings and the reliance of state controls in pre-election challenges.

> "In the case of elections we preempt action for the Federal Government after the election is held. A suit may be filed in a State court prior to an election. The Federal Government takes preemption after an election. We have attempted to exercise Federal rights in those areas where the Federal Government can best do the job and have attempted to provide for State preemption in the areas where the State can do it best. I cannot give a better example than to cite the case of union elec-

issue of the narrowness of the federal rights and the inadequacy of pre-election suits in state courts to preserve and protect the membership against abuses of election procedures, that was attacked in the course of the debate as to acceptance of the McClellan amendment inserting a bill of rights as Title I of the legislation. The McClellan amendment, as originally debated and adopted, stated a number of broad membership rights, including that of "identical voting rights." Enforcement was to be by the Secretary of Labor through actions in federal courts including applications for injunctions to restrain violations and compel compliance.[14] In opposing the amendment, the proponents of the Kennedy-Ervin bill as reported stressed the position that the rights thus conferred were better protected by "existing State law, by the provisions of the pending bill, and by Taft-Hartley law which is now in effect";[15] those successfully supporting the bill of rights amendment made it plain that "the remedy [the Kennedy-Ervin bill] . . . proposes does not begin to deal with the enormity of the situation which has been disclosed by the McClellan committee."[16]

Acceptance of the McClellan amendment establishing a Title I Bill of Rights is conclusive evidence that the Congress did not consider federal regulation limited to post-election judicial enforcement to be adequate. The Kuchel amendment, thereafter, reframed the statement of the rights protected by Title I in language substantially similar to

---

tions. Prior to the day of an election an individual can sue in a State. The day after an election the Secretary of Labor assumes jurisdiction." Leg. Hist. of LMRDA, p. 1112.

[14] Leg. Hist. of LMRDA, p. 1102.

[15] *Id.* at 1108. Statement by Senator Kennedy.

[16] *Id.* at 1114. Statement by Senator Holland.

that of the bill as finally enacted. While the general guarantee of "equal rights and privileges within such organization" was replaced by the enumeration of specific guarantees including those of nomination of candidates, voting, and attendance at meetings, the proponents of the Kuchel amendment clearly accepted the McClellan premise that Title I was needed to afford enforcement of federal rights at all times and not merely through post-election procedures. This is shown most clearly in the vital departure in the Kuchel amendment from the enforcement scheme of the original McClellan version. As stated by Senator Kuchel, in proposing the new Section 102 individual enforcement provision:

> "The amendment of the Senator from Arkansas provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee member himself is in the interest of justice, and therefore we propose to eliminate from the bill the right of the Secretary of Labor to sue in his behalf." [17]

The effect and intent of this major change in the structure of the statute was made even more evident by the action of the Senate, after passage of the Kuchel amendment, in further amending the provisions of Title IV to allow a candidate for union office to bring a private suit in federal district court in order to enforce a pre-election right to fair distribution of campaign literature.[18] The over-all intention to make full and complete pre-election relief available to the individual member is plain.

---

[17] Leg. Hist. of LMRDA, p. 1232.

[18] Leg. Hist. of LMRDA, pp. 1240-42.

It has been observed that the legislative history of the Act is complex, confusing and clouded. This may well be true as to the interpretation of individual provisions in an amalgam of seven titles seeking to regulate a vast array of problems. The total scheme of the federal protection which the Congress sought to create in the area of union elections, however, comes through with remarkable clarity. Title I grants broad guarantees, including equal rights and privileges to nominate and vote, to the individual member and makes them judicially enforceable at his individual option. Title IV sets forth detailed rights and regulations in the area of elections with heavy emphasis upon the rights of candidates to union offices. These Title IV rights, it should be emphasized, include that of "Adequate safeguards to insure a fair election" including "the right of any candidate to have an observer at the polls and at the counting of the ballots."[19] These rights can be enforced in pre-election judicial proceedings by the individual as stressed by [then] Senator Kennedy in the debates.[20] Once the election has been held, however, enforcement is placed within the control of the Secretary of Labor in view of the additional considerations attendant as to ouster of an apparently elected union administration. The design of the statutory protection thus afforded accomplishes the broad, pre- and post-election coverage found wanting in the original bill.

C. *The Intent of Title I Would Be Frustrated Under the District Court's Jurisdictional View.*

The premise of the district court was that the Act creates two sets of federal rights as to elections. These separate rights are to be separately enforceable and are, to a large extent, mutually exclusive. One set of such rights is em-

[19] 29 U. S. C. § 481(c).

[20] Note 13, *supra*.

bodied in Title IV and the view of the district court was that, with minor exceptions, such rights can *only* be enforced in post-election proceedings by the Secretary of Labor. As to Title I, the specific rights mentioned therein can be enforced by individuals in pre-election proceedings except to the extent that they touch upon any matter also covered by Title IV. The same view has found acceptance in some other lower courts.[21] As acknowledged by the Second Circuit Court of Appeals, however, in reversing the dismissal of this action, the dichotomy thus posed with its rigid and narrow view of the rights guaranteed by the Act, cannot be sustained without clearly frustrating the Congressional intent.

The issue of the relationship of the rights granted in Title I and Title IV can be framed in two considerably different postures. The first, and broadest, is whether Title I furnishes a jurisdictional base in Section 102 for a private pre-election suit to sustain rights and rules set forth in Title IV. The second, and narrower, is the issue precisely presented in the case at bar, i.e., in adjudicating a Section 102 complaint based upon an alleged violation of Section 101(a)(1) is the court foreclosed from consideration of the impact of conduct otherwise regulated by Title IV?

The position that Title IV furnishes federal substantive law governing the conduct of union elections which may be

---

[21] The approach has been taken in two distinctly different lines of cases. The first of these is where the complaint is found to attempt to utilize § 102 as the jurisdictional base for contesting actions which are, basically, violations of Title IV. *Johnson* v. *San Diego Waiters & Bartenders Union*, 190 F. Supp. 444 (SD Calif. SD 1961); *Mamula* v. *United Steelworkers*, 304 F. 2d 108 (3rd Cir. 1962), *cert. denied*, 371 U. S. 823. The second is where, as here, the alleged violation of Title I includes actions by the union which might otherwise be subject to Title IV. Cf. *Robins* v. *Rarback*, 325 F. 2d 929 (2d Cir. 1963); but see *Beckman* v. *Local 46, Int'l Assn. of Bridge Workers*, 314 F. 2d 848 (7th Cir. 1963).

utilized either in a pre-election suit by the individual or in a post-election suit by the Secretary of Labor has much to recommend it in the structure and background of the Act. Statutes "must be read in the light of the mischief to be corrected and the end to be attained."[22] There can be no question that Congress found serious "mischief" to be corrected in the conduct of union elections. Congress patently rejected the Kennedy-Ervin concept of limiting federal rights to post-election enforcement through the Secretary of Labor. That was the decision plainly posed and answered in the adoption of the Title I Bill of Rights amendments. The addition of the Bill of Rights was specifically couched on the inadequacy of the Kennedy-Ervin approach granting state remedies in the pre-election period and exclusively federal control through the Secretary of Labor in the post-election period. The addition of the Bill of Rights and the provision for suits by individuals in Section 102, accordingly, could have only two possible meanings. Either Congress intended to create only limited federal pre-election rights under Title I with the state-federal division remaining as to any of the substantive provisions of Title IV, or Congress intended full implementation of such federal rights in actions both before and after the election is held.

The former view bristles with illogic in view of the patent Congressional interest in expansion of membership rights. It would foreclose any enforcement of the federal rules for elections set forth in Title IV except by the Secretary of Labor *after* the election had been held. True, pre-election actions in state courts would remain available. Yet Section 403 provides that:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or

[22] *Warner* v. *Goltra*, 293 U. S. 155, 158 (1934).

> in a different form or manner than is required by its own constitution or by-laws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and by-laws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive."

Where the complained of conduct, accordingly, is consistent with the union's constitution and bylaws although flatly in violation of Title IV rules, the aggrieved member would be stripped of any pre-election relief. As has been commented:

> "It would be strange, indeed, to find that Congress intended that deviations from the union's constitution would be subject to more effective sanctions than violations of congressionally created rights, and that those rights which were deemed so basic as to be prescribed by statute were to be enforced only by a procedure which Congress considered inadequate."[23]

Indeed, under this approach the only federal right in Title IV which could be enforced by a pre-election suit of an individual would be that of fair distribution of campaign literature for which specific authorization is found in Section 401(c).

> "It would be strange to find that a candidate could have a pre-election remedy to enforce his right to mail campaign literature, but no such remedy to enforce his statutory right to be a candidate. The senators mani-

[23] Summers, Pre-emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L. J. 119, 137.

fested considerable confusion in this area, but they did not manifest a compelling desire for such whimsy." [24]

Whimsy is an apt description of the results of a theory which makes the broad guarantee in 401(c) of "adequate safeguards to insure a fair election" unenforceable while affording judicial sanctions for breach of only one of many rules designed to assure such fairness.

An additional factor of consequence is, of course, the fact that post-election judicial enforcement of Title IV rights is severely restricted as to the scope of review. It is only when the court finds that the election was not held within the time limits prescribed by Section 401 or that the violation of that section "may have affected the outcome of an election," that it is authorized to void the results of the balloting. The breach of Title IV rights, accordingly, insofar as post-election review is concerned, is subject to remedy only when there is some assurance that it affected the end result of the election, a finding which might be extremely difficult to sustain as to even open violations of such Title IV requirements as the presence of observers, the inspection of membership lists and, very possibly, the right to be a candidate.

Under the second view, however, that Congress intended full implementation of membership rights, these difficulties are resolved. If a federal right guaranteed by Title IV bearing upon the fairness of an election is infringed, the individual member may, if he wishes, test the matter in a pre-election suit. If his complaint is valid, the matter will be resolved without serious disruption of union affairs. The efficacy of such pre-election remedies has been amply demonstrated by the experience of our state courts in the enforcement of the union's constitutional provisions as to

[24] *Id.* at 138, n. 89.

elections; it would be equally effective as to enforcement of the new federal rights. Should, as may frequently be the case, the individual be unable or undesirous of making such a pre-election challenge, the more limited and carefully supervised remedy for the post-election complaint will be available.

The interrelationship of Titles I and IV, however, in the present instance, need not be determined on the broad issue just discussed. The complaint, here, was clearly grounded upon an alleged violation of the guarantee of equal rights and privileges to nominate candidates granted by Section 101(a)(1). The issue may therefore be restricted to the question whether, in determining if there was an infringement of equal rights and privileges to nominate, the district court can examine the impact of requirements as to eligibility for office which were alleged to be part of a total pattern of forestalling the right to nominate. In short, in a Title I suit, is the court foreclosed from consideration of matters which could be the subject of post-election regulation under Title IV?

In the determination of this narrower issue, of course, the considerations which would impel acceptance of pre-election suits to enforce rights found only in Title IV are equally applicable. The consequences, however, of the "exclusionary" view taken by the district court herein are even more objectionable and the basis of the approach even more untenable as a construction of the statute than in the case of a suit alleging only violations of Title IV rights. This view—that no rule which could be the subject of Title IV post-election procedures can be considered in the determination of whether a right granted by Title I has been denied—would plainly reduce the guarantees of Section 101(a)(1) to ineffectuality. The promise of equal rights and privileges "to nominate candidates, to vote in elections

or referendums . . . to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings" can hardly be met when the consideration of their breach must exclude the detailed restrictions attempting to establish democratic rights in the election area contained in Title IV. The Congress which rejected the post-election controls of Title IV as inadequate, which specifically labored to provide pre-election relief, which stressed, indeed, that the rights specifically named in Title I were not to be read as *excluding* others, would be held to have intended nothing more than minimal protection against a handful of abuses. The suggested subordination of Title I to Title IV, of pre-election relief to post-election relief, of individual suits to administration control, of the broader right to the narrower is particularly incredible in the light of the legislative history. That history is in every respect one of the Congress moving in precisely the opposite direction to that taken by the district court; of deliberations commencing with a bill providing only limited, post-election controls and ending with an Act deliberately incorporating the contrary.

Should the view taken by the district court be sustained, effective relief in the area of election abuses will become substantially futile. As the experience of the state courts has shown, it is only pre-election relief which can be meaningful in most instances of abuses. Yet such relief will be denied the individual union member unless he is contesting an open, naked infringement of his right to nominate or vote unconnected with any other election procedure regulated by Title IV. Further, despite the clear statement of Section 101(b) that "Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force and effect," the opposite situation will prevail. A union constitu-

tion imposing indirect restrictions upon the right to nominate, for example, will be immune from challenge to the extent it utilizes procedures such as eligibility, regulated by Title IV. It will be immune from contest under Title I under the pre-emptive view taken by the district court here and it will be immune from state court challenge because of the restrictions of Section 403. This, although "The whole structure of the statute warns against an easy inference of exclusive remedies, particularly where this may leave a member with no effective remedy." [25]

As has been aptly summarized,

> ". . . the federal courts seem reluctant to interpret the Bill of Rights and related provisions of the LMRDA in other than the narrowest and most literal fashion. This judicial cautiousness has both its advantages and its disadvantages. No one but the bitter enemies of unions would wish the wholesale regulation by courts of internal union affairs. . . .
>
> The disadvantages of a narrow and niggardly judicial approach to the Bill of Rights are equally apparent. We now know enough about the general problems of internal union administration to be able to pinpoint the principal abuses, especially in respect to the relationship between the union and its individual members. The draftsmanship of the LMRDA leaves much to be desired, and some provisions are maddeningly ambiguous or abstruse; yet the broad purposes of the Congress emerge with substantial clarity on most points. Were the courts to ignore all this and to seize every excuse to hold the Bill of Rights inapplicable to problems it was obviously designed to remedy, the consequences

[25] American Bar Association, Report of the Committee on Development of the Law of Union Administration and Procedure, Section of Labor Relations Law, 105 (1960).

would be not only a virtually dead-letter title in the law, but a profound sense of frustration and bitterness, to say nothing of cynicism, among those who hoped to preserve and revitalize a valuable institution by reforming it." [26]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Circuit Court of Appeals should be sustained.

Respectfully submitted,

THOMAS G. S. CHRISTENSEN
40 Washington Square South
New York 3, N. Y.

MELVIN L. WULF
156 Fifth Avenue
New York 10, N. Y.

Attorneys for Amicus Curiae

September 1964.

---

[26] Aaron, The Union Member's Bill of Rights: First Two Years, Industrial Relations, Vol. 1, No. 2, 47 at 70-71, (1962).